

No. 15,356

United States Court of Appeals
For the Ninth Circuit

ROYAL E. JORGENSEN and
MARY M. JORGENSEN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' BRIEF ON REVIEW.

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JURISDICTIONAL PLEADINGS AND FACTS.

Jurisdiction in the above-entitled matter was obtained by the Tax Court in the first instance by the filing of a notice of deficiency by the Commissioner of Internal Revenue and a subsequent filing of a Petition by the taxpayers-appellants.

Said Petition is set forth verbatim in the Transcript of Record and contains the necessary allegations as provided by Section 6213 (a) of the Internal Revenue Code and Rule 7 of the Rules of Practice before the Tax Court of the United States.

STATEMENT OF THE CASE.

This case arose as a result of a deficiency notice, dated October 20, 1955 and mailed to the Appellants. Appellants, by their counsel of record, prepared and mailed a Petition to the Tax Court of the United States by airmail, special delivery, on January 20, 1956.

On January 23, 1956, said Petition was received and filed. On March 19, 1956 Appellee filed a motion to dismiss in the above-mentioned Court.

Said Motion stated its ground for dismissal as lack of jurisdiction in the said Tax Court; in that said Petition was not filed within ninety days from the date of the deficiency notice. Appellants filed a written response to the motion, and said response was not considered since the record showed on its face that the Petition was not filed within ninety days. Whereupon the Tax Court entered its order of dismissal.

The questions squarely raised on review are as follows:

1. Whether or not the Tax Court is divested of jurisdiction where a Petition has not been filed within ninety days from the date of the deficiency notice, but is filed prior to any legal move having been taken by the Commissioner to take advantage of such default.

2. Whether Appellee's motion to dismiss was timely.

3. Whether or not a dismissal of this particular case would deny Appellants due process of law, both remedial and substantive.

4. Whether or not a dismissal of this case would arbitrarily force Appellants to pay a tax amount which they do not lawfully owe.

5. Whether or not a dismissal of this case would constitute an unlawful delegation of legislative powers to the Commissioner.

The foregoing questions were all raised in Appellants' Response to Appellee's Motion to Dismiss. Inasmuch as the Minutes of the proceedings of the Tax Court show no consideration or ruling on the points thus raised, said written Response was not included in the Record on Review and are hereby raised and will be argued again on the basis that the Court below erred in not ruling on said questions.

SUMMARY OF POINTS TO BE ARGUED.

1. That the Commissioner's Motion to dismiss was not filed within forty-five days from the time he was served with the Petition filed herein.

2. That the Petition filed herein was filed before the Commissioner had made a legal move to recover on his deficiency notice.

3. That to dismiss the Petition without a hearing on its merits would be arbitrarily to force the Appellants to pay a tax amount which they do not owe under the law.

4. That to dismiss the Petition filed herein would be to deny the Appellants due process of law, both remedial and substantive as provided by the United States Constitution.

5. That to dismiss the Petition herein is to give the Commissioner the legislative power to levy and collect a tax on income different and separate from that tax on income authorized by Congress, and since Congress has no power to delegate its legislative authority it is unconstitutional for the Commissioner to assume such authority or for the Court, by its act, to award him such authority.

6. That Section 6213 (a) and (c) of the United States Code, 1954, which the Commissioner has cited, provides a time limit within which the Commissioner may not recover on his deficiency. There is no statement in the said Sections which may be construed to mean that the Court has no jurisdiction to hear a case not brought before it within ninety days.

7. That notwithstanding the fact that the Petition is entitled "Petitioners vs. The Commissioner", the Appellants are defendants in every legal sense of the word, and under the Constitution of the United States are entitled to all the rights and privileges of defendants in any other court or any other kind of case.

ARGUMENT.

1. Rule 14 (a) provides that the Commissioner shall have forty-five days in which to move in regard to the Petition, and the Motion filed herein was not made within such forty-five day limit. Rule 19 (a) provides that motions must be timely and there was, as the record will show, no extension of time granted to Appellee, pursuant to Rule 20 (a). Therefore, the

Court below erred in entertaining Appellee's Motion to Dismiss. To have refused such motion would have denied neither the taxpayers nor the Government a hearing on the merits.

2. Appellants contend that, since their Petition was filed before the Commissioner had made a legal move to recover on the alleged deficiency, they are in the same position as a defendant in a civil case who fails to answer a complaint within the statutory time but does answer before a default is entered. In which event, the matter is still before the Court for a hearing on the merits and such should be the case in the above entitled matter. To not dismiss this case and to allow it to proceed on to a hearing on its merits works no hardship on the Government since the case will be heard on its merits, and if the Government's position is sound, a recovery will be had. On the contrary, if the case is dismissed, the Appellants will have to pay a tax which may or may not be correct, and which is alleged to be arbitrary and wrong by a properly drawn, verified Petition. Such latter event is not in keeping with the United States Constitution nor any accepted tenet of American jurisprudence. The central, underlying fact and basic principle upon which our whole system of law rests is that every individual shall have a right to be heard on the merits of his case. The abandonment of the ancient forms of common law practice and pleading clearly demonstrate such a principle.

3. The Fifth Amendment to the United States Constitution provides that one shall not be deprived

of life, liberty or property without due process of law. Due process rests, fundamentally, on the right of one to have his case heard on its merits, particularly where the Government is the adverse party. The Petition alleges that the deficiency assessed by the Commissioner is arbitrary and incorrect, and for the purpose of arguing this Motion to Dismiss the allegations of the Petition must be deemed well pleaded and correct. Therefore, since we must assume the said allegations to be correct, to dismiss the case and deny the right to be heard on the merits is to force the Appellants to pay a tax which is admitted by the Commissioner to be arbitrary and incorrect. All of which is to deprive the Appellants of their property without due process of law. It is unthinkable that the Appellants should be deprived of their property by the mere passage of two days' time. Such is not the collection of taxes.

4. Every person under the Constitution is entitled to both remedial and substantive due process; and to dismiss this case at this time after it was filed before default was entered by the Commissioner making some move to recover on his assessment, is to deny the Appellants remedial due process, and since such denial will cut off Appellants' right to a hearing on the merits of this case, such dismissal will constitute a denial of substantive due process. (The legal points hereinabove set forth have been so grounded in history by the United States Supreme Court landmark cases in interpreting the Constitution that the writer does not feel it necessary to waste the Court's time by citing them here.)

The Appellants are average small town citizens, they filed their return in good faith and with the aid and assistance of an agent from the Internal Revenue Department. They, like the majority of other similarly situated persons, were not aware of the exigencies attendant upon the ninety day notice, nor was competent counsel available until the writer assumed his present position in the community, but since becoming acquainted with the necessities and their consequences, Appellants have made every effort to have their case heard on its merits.

5. It goes without saying that the Commissioner has no right to collect an admittedly arbitrary tax and for the Court to aid and abet such a collection is unlawful and unconstitutional.

6. Section 6213 of the United States Code 1954 contains no statement to the effect that a failure to file within ninety days deprives the Court of jurisdiction. It provides, in effect, that the Commissioner must wait ninety days to start collecting on his assessed deficiency. To say otherwise is to read something into the statute that is not there. Subsection (c) of the above Section provides that if the taxpayer does not file a Petition with the Tax Court within the time prescribed in Subsection (a) of the above, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed and shall be paid *upon notice and demand* from the secretary or his delegate.

The plain unequivocal law to be gained from said Section 6213 (a) and (c) is that the Commissioner must wait ninety days before proceeding to assess

the deficiency against the taxpayer and that at the end of ninety days if the taxpayer has not filed a Petition, the Commissioner must give notice and make demand for payment of said deficiency.

While it may be true that the Tax Court is an executive agency and that its jurisdiction is limited and purely statutory, the plain fact is that the statute must necessarily provide within it clearly and without mistake any such limitation claimed to be imposed by such statute. If it is possible for the Commissioner to read from the above-mentioned section that the Court is without jurisdiction after the ninetieth day, in the absence of a plain statement to that effect, it is equally reasonable for the taxpayer to say that a Petition filed after the ninetieth day and before notice and demand, preserves the Court's jurisdiction. Thus, it follows, in view of the foregoing, that the above cited Section must be construed in connection with the particular facts of the instant case. It has long been settled that where there are two possible constructions of a statute one of which would give it a constitutional effect and the other would not, the former must be adopted.

In the instant case there is an uncontroverted allegation to the effect that a clearly unlawful tax has been imposed by the deficiency filed herein and that to follow the Commissioner's construction of the above section would give such section the effect of forcing the taxpayer to pay an unlawful tax all of which is clearly in violation of the letter and the spirit of the Fifth Amendment to the United States Constitution.

In no other Court or administrative body within the structure of American jurisprudence can such a legal device as Appellee's Motion to Dismiss be used to deprive a person unlawfully of his property. If the Commissioner's case is sound the Government suffers no hardship by a hearing on the merits.

7. Since the Commissioner's case is made out *prima facie* at the time he files his ninety day notice, and since the taxpayer is under a burden to defend or be liable upon the filing of such ninety day notice, the taxpayer petitioner is clearly a defendant, and Section 6213 should be construed in the same manner and to the same effect as the Federal Rules of Civil Procedure and all doubts should be resolved in favor of the defendant.

A line of cases has recently come to the writer's attention which purport to have established the Commissioner's position as a matter of law and counsel for the Appellee will no doubt urge such cases as authority, however, it is to be pointed out that none of such cases considered the constitutional effect in a factual situation precisely similar to the case at bar.

Wherefore, Appellants pray that the decision of the United States Tax Court be set aside and the above-entitled case be remanded for hearing on its merits.

Dated, Battle Mountain, Nevada,
March 18, 1957.

GEORGE G. HOLDEN,
Attorney for Appellants.

